

**16-6a-612. Derivative suits.**

(1) Without affecting the right of a member or director to bring a proceeding against a nonprofit corporation or its directors or officers, a proceeding may be brought in the right of a nonprofit corporation to procure a judgment in its favor by a complainant who is:

- (a) a voting member; or
- (b) a director in a nonprofit corporation that does not have voting members.

(2) A complainant may not commence or maintain a derivative proceeding unless the complainant:

(a) is a voting member, or a director in a nonprofit corporation that does not have voting members, at the time the proceeding is brought; and

(b) fairly and adequately represents the nonprofit corporation's interests in enforcing the nonprofit corporation's right.

(3) (a) A complainant may not commence a derivative proceeding until:

(i) a written demand is made upon the nonprofit corporation to take suitable action; and

(ii) 90 days have expired from the date the demand described in Subsection (3)(a)(i) is made, unless:

(A) the complainant is notified before the 90-day period expires that the demand is rejected by the nonprofit corporation; or

(B) irreparable injury to the nonprofit corporation would result by waiting for the 90-day period's expiration.

(b) A complaint in a derivative proceeding shall be:

(i) verified; and

(ii) allege with particularity the demand made to obtain action by the board of directors.

(c) A derivative proceeding shall comply with the procedures of Utah Rules of Civil Procedure, Rule 23.1.

(d) The court shall stay any derivative proceeding until the inquiry is completed and for an additional period as the court considers appropriate if:

(i) the nonprofit corporation commences an inquiry into the allegations made in the demand or complaint; and

(ii) a person or group described in Subsection (4) is conducting an active review of the allegations in good faith.

(e) If a nonprofit corporation proposes to dismiss a derivative proceeding pursuant to Subsection (4)(a), discovery by a complainant in the derivative proceeding:

(i) is limited to facts relating to:

(A) whether the person or group conducting the inquiry is independent and disinterested;

(B) the good faith of the inquiry; and

(C) the reasonableness of the procedures followed by the person or group conducting the inquiry; and

(ii) may not extend to any facts or substantive issues with respect to the act, omission, or other matter that is the subject matter of the derivative proceeding.

(4) (a) A derivative proceeding shall be dismissed by the court on motion by the corporation if a person or group specified in Subsection (4)(b) or (4)(f) determines in

good faith, after conducting a reasonable inquiry upon which the person's or group's conclusions are based, that the maintenance of the derivative proceeding is not in the best interest of the nonprofit corporation.

(b) Unless a panel is appointed pursuant to Subsection (4)(f), the determination in Subsection (4)(a) shall be made by:

(i) a majority vote of independent directors present at a meeting of the board of directors, if the independent directors constitute a quorum; or

(ii) a majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not the independent directors appointing the committee constituted a quorum.

(c) None of the following by itself causes a director to be considered not independent for purposes of this section:

(i) the nomination or election of the director by persons:

(A) who are defendants in the derivative proceeding; or

(B) against whom action is demanded;

(ii) the naming of the director as:

(A) a defendant in the derivative proceeding; or

(B) a person against whom action is demanded; or

(iii) the approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.

(d) If a derivative proceeding is commenced after a determination is made rejecting a demand by a complainant, the complaint shall allege with particularity facts establishing either:

(i) that a majority of the board of directors did not consist of independent directors at the time the determination was made; or

(ii) that the requirements of Subsection (4)(a) are not met.

(e) (i) If a majority of the board of directors does not consist of independent directors at the time the determination is made to reject a demand by a shareholder, the corporation has the burden of proving that the requirements of Subsection (4)(a) are met.

(ii) If a majority of the board of directors consists of independent directors at the time the determination is made to reject a demand by a complainant, the plaintiff has the burden of proving that the requirements of Subsection (4)(a) are not met.

(f) (i) The court may appoint a panel of one or more independent persons upon motion by the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interest of the corporation.

(ii) If the court appoints a panel under Subsection (4)(f)(i), the plaintiff has the burden of proving that the requirements of Subsection (4)(a) are not met.

(g) A person may appeal an interlocutory order of a court that grants or denies a motion to dismiss brought pursuant to Subsection (4)(a).

(5) On termination of a derivative proceeding the court may order:

(a) the nonprofit corporation to pay the plaintiff's reasonable expenses, including attorney fees, incurred in the proceeding, if it finds that the proceeding results in a substantial benefit to the nonprofit corporation;

(b) the plaintiff to pay a defendant's reasonable expenses, including attorney

fees, incurred in defending the proceeding, if it finds that the proceeding was commenced or maintained:

- (i) without reasonable cause; or
- (ii) for an improper purpose; or
- (c) a party to pay an opposing party's reasonable expenses, including attorney fees, incurred because of the filing of a pleading, motion, or other paper, if the court finds that the pleading, motion, or other paper was:
  - (i) (A) not well grounded in fact, after reasonable inquiry; or
  - (B) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
  - (ii) interposed for an improper purpose, such as to:
    - (A) harass;
    - (B) cause unnecessary delay; or
    - (C) cause needless increase in the cost of litigation.

Amended by Chapter 228, 2006 General Session